COMMONWEALTH OF MASSACHUSETTS

before the

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Fitchburg Gas & Electric Light Company) D.T.E. 99-66

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INITIAL BRIEF OF THE ATTORNEY GENERAL

Respectfully submitted,

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INTRODUCTION

On May 15, 1998, Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company") filed with the Department of Telecommunications and Energy ("Department") proposed

rates and charges designed to increase the Company's annual base rates from gas sales by $1.55 million or 9.0 percent, based on a test year ending December 31, 1997. During the course of the investigation of this filing, the Department determined that the Company had, in violation of applicable regulations (220 C.M.R. 6:00), included interest costs on gas inventories within its Cost of Gas Adjustment ("CGA") charges since 1987. Fitchburg Gas & Electric Light Company, D.T.E. 98-51, p. 21 (1998). It also appeared that the Company's base rates for gas reflected the cost of financing gas inventory balances (through the cash working capital component of the rate base used to determine base rates). Id. The fact that the Company may have collected both base rates reflecting a working capital allowance for gas inventories and CGA charges for actual gas inventory costs(1) prompted the Department to open this investigation. Id.

PROCEDURAL HISTORY

On November 1, 1999, the Department, on its own motion, issued a Notice of Investigation into Fitchburg's recovery of costs related to interest on gas inventory, indicating that:

this investigation will include, but not be limited to, an examination of the following issues: (1) whether Fitchburg over-collected for costs related to gas inventory; (2) the amount of any such over-collection; and (3) whether Fitchburg's ratepayers are entitled to reimbursement for any over-collection.

Notice Of Investigation, D.T.E. 99-66, November 1, 1999. The Department conducted a public hearing on December 8, 1999, and established at which time a procedural schedule following the hearing. No party other than the Attorney General intervened in the investigation.

On January 14, 2000, the Company filed the testimony of Karen M. Asbury, Manager of Regulatory Services for Unitil Service Corporation, an affiliate of the Company, and Dr. Susan F. Tierney, an economist and expert witness on utility regulation. Dr. Tierney is a former Massachusetts utility commissioner and Secretary of Environmental Affairs as well as a former Assistant Secretary at the U.S. Department of Energy. On January 25, 2000, the Attorney General filed the testimony of Timothy Newhard, a financial analyst with the Regulated Industries Division of the Office of the Attorney General. The Department held evidentiary hearings at its offices on March 14, 15 and 22, 2000, during which all witnesses were cross-examined.

During the course of the evidentiary hearing held on March 15, 2000, the staff of the Department questioned Ms. Asbury regarding the Company's preceding base rate case. Fitchburg Gas & Electric Light Co., D.T.E. 98-51 (1998). The Company sought to "reserve the company's right to call a rebuttal witness," claiming that it did not have notice that "what the company did in preparing its case in 98-51 would be an issue in this proceeding." Tr. II, pp. 322, 323. The Hearing Officer denied the motion. Tr. II, p. 327.

The Company appealed the Hearing Officer's ruling on March 21, 2000, seeking to be allowed to present the "rebuttal" testimony of an outside consultant who participated in the preparation of the Company's rate case, D.T.E. 98-51. In the alternative, the Company asked that the Affidavit of James L. Harrison, appended to the motion, be accepted "in lieu of oral testimony." Appeal, p. 6.

On March 28, 2000, the Attorney General filed a response to the Company's appeal, in which he supported the ruling of the hearing officer, and requested that Mr. Laurence Brock, the Controller of Unitil who sponsored the Company's cost of service in D.T.E. 98-51, also be ordered to appear in the event that the Department allowed the testimony of Mr. Harrison .

On March 29, 2000, the Attorney General received, under cover of a letter dated March 28, 2000, a second interlocutory appeal of the Company, asking the Department

to set aside the Hearing Officer's ruling denying the Company's objection to questions regarding the stipulation in D.T.E. 84-145. The Hearing Officer had ordered the portion of the record the Company wanted stricken, i.e., the Bench's questioning of the Attorney General's witness regarding his recollection of the stipulation, to be taken on a sealed record.

On April 19, 2000, after the close of the record in this case, the Department informed the parties that it had located CGA filings made by the Company during years 1987-1993 that neither the Company nor the Department had previously been able to locate. Copies of these archived papers were provided to the parties. Exh. JT-1. As a result of this discovery and upon the July 2000, motion of the Attorney General, the Department reopened the record in November 2000 to take further evidence on these CGA filings.

On January 12, 2001, the Attorney General filed supplemental testimony of Timothy Newhard. On the same day Fitchburg offered the testimony of David Graham, Scott Ferrari and Karen Asbury.

During the reopened hearings on February 14, 2001, the Hearing Officer, on his own motion, excluded from the record notes and memoranda of a former Department analyst Richard Norris on the grounds that they "have no probative value to the Department's investigation." Tr. IV, p. 483-84. These materials had been included within the missing materials discovered by the Department, copies of which had been included within Ms. Asbury's exhibits and addressed in her testimony. In light of this ruling, the Attorney General requested that the prefiled testimony of Ms. Asbury be stricken from the record to the extent it quote from or forms opinions based on the notes of Mr. Norris. Tr. IV, pp. 486-87, 490-92. The Hearing Officer took the matter under advisement, Tr. IV, p. 492, and the Company filed an appeal of the exclusion ruling on February 16, 2001. The Attorney General opposed the appeal on February 23, 2001.

On February 14, 2001, notwithstanding the fact that an appeal from the original ruling by another Hearing Officer (Tr. II, p. 327) was still pending before the Commission, the Hearing Officer, sua sponte, reconsidered this earlier ruling denying the Company's request to call Mr. James Harrison as a witness. Tr. IV, p. 531. Over the reservations of the Attorney General and subject to a narrow line of Bench questioning, the Company was permitted to call Mr. Harrison on less than twenty-four hours notice for a hearing on February 15, 2001. Tr. IV, pp. 531-35. At this hearing the Attorney General voiced his objection that, since the appeal of the previous Hearing Officer's ruling was still pending before the Commission, the current Hearing Officer had no jurisdiction to reconsider the issue. Tr. V, pp. 545-46.

OVERVIEW

The Department should find that between 1987 and 1998 Fitchburg collected $675,052(2) over the amount permitted to be collected under the applicable cost of gas adjustment regulations and that the Company's customers are entitled to be reimbursed for this over-collection with interest. Moreover, and in response to the two briefing questions posed by the Department in this proceeding, requiring reimbursement to the Company's customers would not constitute improper retroactive ratemaking and would not in any way conflict with fact that the Company's base rates between 1987 and 1998 were the result of a rate settlement. All of the Company's protestations to the contrary are without merit.

First, the Department should conclude that between 1987 and 1998 the Company over-collected $675,052 from it customers. The Department has already determined that the inventory finance charges included in the Company's CGAC from 1987 through 1998 did not comply with the requirements set forth in the applicable regulations. The financing costs had not been incurred under an approved financing vehicle and, therefore, the amounts in question were collected in violation of law. Fitchburg Gas & Electric Light Company, D.T.E. 98-51, pp. 21-22. On the basis of this finding alone, the Department should conclude that the amounts in question represent over-collections from consumers for which they should receive reimbursement. It is

axiomatic that amounts collected in violation of applicable regulations represent over-collections: they are in excess of the level of lawful collections.

This conclusion is even more compelling when considered from the perspective of the rates that the Company's customers would have paid had it have sought to comply with the Department's regulations. As Mr. Newhard explained:

the only conclusion that can be drawn from the facts and circumstances concerning the Company's rates during the period from 1987 through 1998 is that, had the Company sought approval for a financing vehicle prior to adding gas inventory financing costs to its CGAC, the Department would have approved that addition only after ensuring that there was a corresponding decrease to base rates.

Exh. AG-1, p. 16. The course described by Mr. Newhard is the course that needed to be followed to prevent the Company from including gas inventory charges in both its base and CGAC rates and it is the course that the Department had followed in every other proceeding in which a gas company had sought to include inventory finance charges in its CGAC. Id. pp. 8-11. Had that course been followed here, the Company would not have begun to collect gas inventory finance charges in its CGAC until December, 1998 -- the effective date of the rates established in D.T.E. 98-51 and first date on which the Company could demonstrate that gas inventory finance charges were not reflected in its base rates. The Company would have collected $675,052 less in CGAC charges from 1987 through 1998. Again, as explained by Mr. Newhard,

Whether one uses the term "over-collection," "double-recovery," or "wrongfully collected" charge, the fact is that there was economic harm to the Company's customers as a result of the Company charging inventory finance charges through the CGAC from 1987 through 1998.

Exh. AG-1 p. 13.

Second, the Department should conclude that fairness and sound regulatory policy require that the Company's customers be reimbursed for the $675,052 that the Company wrongfully collected. This result would not contravene the proscription against retroactive ratemaking and does not conflict with the fact that the Company's base rates during the time in question were the result of a settlement. It is settled law that the prohibition against retroactive ratemaking is of limited application in the context of cost adjustment clauses and, as the Department has explained recently, it has no application at all where, as here, the rate in question has not yet become "fixed by a formal finding that had become final." Boston Gas Company, D.T.E. 96-50-D (2001).

Moreover, requiring a refund of monies collected to offset costs that did not meet applicable regulatory requirements does not conflict with the fact that the Company's base rates during the period in question were the result of a rate settlement. That fact is simply not relevant to the issue presented here: whether the Company should be required to refund to consumers amounts collected beyond those permitted under the Department's regulations. It is of no consequence whether the Company's base rates at the time of these wrongful collections were the result of a settlement or a fully litigated decision. In either event, had the Company complied with the Department's regulations and sought approval for the vehicle under which it incurred the financing costs, there is absolutely no reason to believe that the Department would not have followed its past practice and deferred approval of the inclusion of the finance costs in the CGAC until it was clear that these costs were not also reflected in the Company's base rates.

The Company's various protestations over a requirement that it reimburse its

customers for amounts it collected wrongfully -- that it was merely following Department orders, that notwithstanding its failure to comply with regulatory requirements its rates were "within a zone of reasonableness," and that it would be poor policy to require reimbursement for monies collected pursuant to tentative Department approval -- are all without merit. The Department has already determined that the Company's collections did not comply with its requirements, Fitchburg Gas & Electric Light Company, D.T.E. 98-51, pp. 21-22 (1998), rejected attempts to connect earnings levels to the appropriate level of adjustment clauses, and has in the past required refunds of amounts collected in prior years pursuant to rates that have received tentative approvals. Boston Edison Company, D.P.U. 1009-I, p. 8 (November 3, 1982).

IV. SUMMARY OF EVIDENCE

Facts

Prior to 1987, Fitchburg's gas inventory finance costs had, consistent with the Department's long-standing approach, been recognized exclusively through an allowance included in the computation of the rate base used to determine its base rates. This was the approach used in the Company's last adjudicated rate case, Fitchburg Gas & Electric Light Company, D.P.U. 1214 (1982), see Exh. AG-1, pp. 11-13 and Attachments 1, 2, and 3, and it is the approach that Company employed in the 1984 filing that resulted in the settlement in Fitchburg Gas & Electric Light Company, D.P.U. 84-145 (1984). See Exh. AG-1, pp. 11-12 and Attachments 4 and 5. In 1987, after the Department adopted new CGAC regulations, the Company began including gas inventory finance costs in its annual CGAC reconciliation filing, although between 1987 and 1998 its semi-annual Gas Adjustment Factor filings indicated that it was not seeking to recover gas inventory finance costs through that charge. Exh. JT-1 and Exh. AG-1 (dated 2/14/01), pp. 5-6. In its 1998 base rate case, the Company's filing provided for the recovery of gas inventory finance costs in both base rates and its CGAC. See D.T.E. 98-51, Exh. FGE-LMB-2, Schedule 3, 15, and 19, Company's Brief, p. 30 and Company Reply Brief, p. 17. As a result of the consideration of this issue in D.T.E. 98-51, the Department ordered Fitchburg to cease charging interest on inventory through the CGAC until it either complied with the regulations or successfully petitioned for an exception. Thereafter, in Fitchburg Gas & Electric Light Co., D.T.E. 99-32 (1999), the Company petitioned for an exception based upon considerations relating to the availability of the parent, Unitil's, funds pool. Given that a double-collection of interest on inventory costs is now impossible due to the Department's exclusion of inventory costs from the Company's working capital portion of base rates in D.T.E. 98-51, the Attorney General did not object to the requested exception.

Testimony of Witnesses

Ms. Karen Asbury

The Company's main evidentiary presentation was made by Karen Asbury, Director of Rates at Unitil. In her testimony, Ms. Asbury described the history of the Company's CGAC and base rates and presented computations of earned rates of return for the Company's gas operations during the period in question. Exh. FGE-3, pp. 3-4. Ms. Asbury explained that as a result of various semi-annual CGAC filings the Company made with the Department from 1987 through 1998, it collected $675,052 in CGAC revenues to offset gas inventory finance charges. In her initial testimony, she indicated that "[b]ased on a review of available records, the Company believes that the necessary information [to evaluate the Company's CGA filings] was filed with the Department." Id. p. 7. She added that the Company was not aware of any Department disapprovals of any CGAC filings and that she was not aware of any questions concerning the Company's inclusion of inventory finance costs in its CGAC from either the Department or any other party. Id. pp. 7-8. Following her review of the previously unavailable documentary materials from the Company's filings from 1987 through 1993, Ms. Asbury explained in supplemental testimony that, although the Company had not included an estimate of inventory finance costs in its semi-annual GAF filings, it did include those costs in its annual reconciliations and the individual responsible for those filings indicated that this "practice" reflected a "conservative" approach by the Company. Exh. FGE-3 (2/14/01) pp. 4-14 (Asbury); Exh. FGE-1 (2/14/01), p. 8 (Graham); Exh. FGE-2 (2/14/01), pp. 6-8 (Ferrari).

Ms. Asbury also explained that the Company's base rates during the entire period in question had been established by the Department on the basis of a settlement agreement between the Company and the Office of the Attorney General in D.P.U. 84-145 that was approved on November 29, 1984. Because the terms of both the settlement and the Department's order expressly disclaimed the resolution of any particular position, principle or calculation in the proceeding, Ms. Asbury indicated that these base rates did not include any allowance for gas inventory finance charges. Id. pp. 8-11. In addition, Ms. Asbury presented information on the earnings produced by the Company's gas operation during the 1987-98 time frame and on changes in the composition of its gas inventory cost between 1981 and the present.

Dr. Susan F. Tierney
The Company also presented testimony by Dr. Susan Tierney, an economist and expert witness on utility regulation. Dr. Tierney is a former Massachusetts utility commissioner and Secretary of Environmental Affairs as well as a former Assistant Secretary at the U.S. Department of Energy. After explaining her understanding of the regulatory framework governing the Company's rates and of the facts of the case as presented by Ms. Asbury, Dr. Tierney opined that there had been no over-collections by the Company and that "sound public policy" required the Department to refrain from ordering refunds in the absence of evidence of "wrong-doing and malfeasance."

Mr. Timothy Newhard
The Attorney General's evidentiary presentation was made by Mr. Timothy Newhard, a financial analyst with nearly twenty years experience in technical issues relating to Massachusetts utility rates. Based upon his review of the facts and circumstances concerning Fitchburg's gas rates during the period 1987 through 1998, Mr. Newhard concluded that the Company had collected $675,052 more from its customers than it should have. Exh AG-1. He explained that the Department's consistent past practice had been to condition approval of gas inventory financing vehicles on terms that precluded any simultaneous recognition of inventory financing costs in both base rates and the CGAC. Thus, he opined that if the Company had sought the Department's approval for a financing vehicle prior to including gas inventory financing costs in its CGAC, the Department would have deferred inclusion of those costs in the Company's CGAC until it could conclude that these costs were not also reflected in the Company's base rates.

Mr. Newhard explained the history of the Department's treatment of interest on

inventory charges. Following the Cape Cod and Lowell Gas Company rate cases of 1977 and 1978(3) and (whose issues concerned, inter alia, the double-recovery of gas inventory financing costs), the Department initiated a study of the CGA's in effect at that time. The study culminated in the regulations entitled "Standard Cost-of-Gas Adjustment Clause-- Cost Recovery and Amendments to the Uniform System of Accounts,"Standard Cost of Gas Adjustment Clause, D.P.U. 4240-78/ D.P.U. 19806 (1979). Exh. AG-1. In those regulations, the Department addressed such topics as the gas costs that could be recovered by companies with approved CGA's and the need to change base rates when transferring costs to the CGA. Id., p.9. The Department also amended the Uniform System of Accounts to restrict the costs could that be included in the CGA. Fitchburg was a party to that proceeding.

In 1980, the Department again refined its CGA regulations. Cost of Gas Adjustment

Clause, D.P.U.19806-A/D.P.U. 20147 (1980). Fitchburg was also a party to that proceeding. Also in 1980, the Department for the first time approved the collection of interest on inventory through the revised CGA in Haverhill Gas Company, D.P.U.246 (1980). This was the first adjudicated, individual company case in which the Department established two basic requirements necessary to collect interest on inventory through the CGA: (1) a fuel trust or other fuel inventory vehicle which has received Departmental approval under G. L. c. 164, § 17A, or a Department exception thereto, and (2) an adjustment to base rates to avoid a double-collection

which would otherwise occur since gas inventories at that time were included in the cash working capital component of base rates. Id.

The Department thereafter addressed the ratemaking treatment of gas inventory

cash working capital costs on numerous occasions, in each instance seeking to protect against any future simultaneous recovery of gas inventory financing costs through the CGAC and through base rates. The Department determined that CGAC recovery of gas inventory financing costs from an appropriate financing vehicle, like a trust, provided an efficient result for utilities and ratepayers, but only if accompanied by a contemporaneous offsetting reduction in the base rates. The Department clearly set forth its requirement in orders approving fuel inventory trusts. For example, the Department ordered the Haverhill Gas Company to remove its fuel inventory from rate base as a condition of collecting interest on inventory through the CGA. Haverhill Gas Company, D.P.U. 246, p.7 (1980).

Mr. Newhard also described how the Department took similar steps in two other cases to ensure against double collection of gas inventory finance cost. In Boston Gas Company, D.P.U. 123 (1980), the Department prohibited the CGAC treatment until base rate treatment had ended:

FURTHER ORDERED: That the Boston Gas Company may collect the price it pays for liquefied natural gas purchases pursuant to the LNG Purchase Agreement under its Cost of Gas Adjustment Clause, beginning on, but not before, the date of the decision in its next general rate case; provided, however, that none of the liquefied natural gas owned by Boston LNG Company will be eligible for inclusion in Boston Gas Company's rate base for ratemaking purposes;

Id., pp. 11-12. In Bay State Gas Company, D.P.U. 952 (1982), the Department prescribed a similar protection:

The Company shall not pass any financing charges, interest costs or associated fees through the CGA until an appropriate adjustment is made to the existing base rates to reflect the savings arising from the fact that the Company will no longer be required to finance its gas inventory.

Id., p.12.

Importantly, Mr. Newhard explained that the Department's practice of ensuring the removal from base rates of any costs to be moved into the CGAC applies to all such costs, not just to the cash working capital requirements associated with supplemental fuel inventories. In particular, he indicated that this approach had been followed in connection with cash working capital requirements associated with purchased gas expense, Boston Gas Company, D.P.U. 88-67, pp. 40-43 (1988), administrative costs related to gas supply acquisition and local storage costs, Boston Gas Company, D.P.U. 93-60, pp. 267-268 and 280-284 (1993), as well as the gas cost component of "bad debt" expenses. Boston Gas Company, D.P.U. 96-50, pp. 70-73 (1996).

Mr. Newhard also opined that because the Company and its shareholders had had the use of the monies wrongfully collected since 1987, it would be appropriate that the Company's customers be reimbursed for the time value of that money with an award of carrying charges based on a number of rates that the Department could consider.

ARGUMENT
THE DEPARTMENT SHOULD CONCLUDE THAT BETWEEN 1987 AND 1998, FITCHBURG OVER-COLLECTED $675,052 IN CGAC CHARGES
In its November, 1998 decision in D.T.E. 98-51, the Department determined "that the Company's method of financing does not comply with" 220 C.M.R. § 6.06. The $675,052 collected to offset financing costs not incurred under a vehicle approved by the Department, therefore, was collected wrongfully and should be refunded to the Company's customers. As Mr. Newhard explained:

the only conclusion that can be drawn from the facts and circumstances concerning the Company's rates during the period from 1987 through 1998 is that, had the Company sought approval for a financing vehicle prior to adding gas inventory financing costs to its CGAC, the Department would have approved that addition only after ensuring that there was a corresponding decrease to base rates.

Exh. AG-1, p. 16. In these circumstances, with an adjudicated violation of the Department's regulations and a known amount of wrongful collections, the need for and fairness of a refund to consumers is obvious.

The Department should reject the Company's various pleas that its violation be overlooked as a good faith mistake or because it did not result in excessive earnings. It is the responsibility of a regulated utility to comply with lawful rules and regulations. Wilkinson v. New England Telephone & Telegraph Company, 327 Mass. 132, 135 (1951)(duty to provide service in compliance with regulations); Dr. Daniel C. Merrill, 43 FERC ¶ 61,264 (1988) (entities appearing before the Commission are charged with knowledge of its regulations); Dunn and McCarthy, 40 FERC ¶ 61,359 (1987) (consultation with staff does not excuse ignorance of regulations); Tr. 1, p. 61 (utilities have an obligation to understand and comply with the regulations and precedents). Tr. I, p. 61. This is particularly true where, as in Massachusetts, the regulator provides a specific procedure for the submission of questions of doubtful interpretation on the requirement of regulations.(4) 220 C.M.R. § 50.00 (General Instruction No. 10); Tr. I, p. 61. Fitchburg never availed itself of the option to seek guidance from the Department in connection with its apparent determination the word "approved" in 220 C.M.R. § 6.06 was intended to be superfluous, Exhs. AG-1-11, AG-1-17, notwithstanding the fact that it had been a party to D.P.U. 1669 (represented by two different firms), filed comments and should have been aware that the necessity of preventing double collections was repeatedly addressed in that rulemaking proceeding.(5)

REQUIRING A REFUND OF THE COMPANY'S WRONGFUL COLLECTIONS IS THE CORRECT REGULATORY APPROACH AND WOULD NOT CONSTITUTE IMPROPER RETROACTIVE RATEMAKING

The Department can and should require the Company to refund to its customers the $675,052 it wrongfully collected from 1987 through 1998. This approach will not only remedy the wrong done to Fitchburg's customers but, as is explained below, it is an approach that is consistent with existing law on past over-collections by utilities and would not constitute improper retroactive ratemaking.

First, under Massachusetts law, utilities are required to refund monies wrongfully collected. This is true whether the wrongful collection occurs as a result of a mistaken billing, Metropolitan District Commission v. Department of Public Utilities, 352 Mass. 18, 27 (1967), or as a result of a subsequent determination that an earlier tentatively approved rate was in excess of the appropriate amount. Boston Edison Company, D.P.U. 1009-I, p. 8 (November 3, 1980)(reconciling revenues collected between September, 1974 and October, 1980). Cf. Commercial Union Insurance Company v. Boston Edison Company, 412 Mass. 545 (1992) (refund with interest required for excess steam billings resulting from a defective meter). The appropriate remedy is a refund of the past excess collections.

Second, although it is well that "retroactive adjustments to prior approved rates may not be awarded absent specific statutory authorization," Associated Industries of Massachusetts, Inc. v. Commissioner of Insurance, 403 Mass. 37, 45, 525 N.E.2d 670 (1988), citing Lowell Gas Company. v. Attorney General, 377 Mass. 37, 45, 385

N.E.2d 240 (1979); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 50, 375 N.E.2d 305, cert. denied, 439 U.S. 921, 99 S.Ct. 301, 58 L.Ed.2d 314 (1978); Metropolitan District Commission v. Department of Public Utilities, 352 Mass. 18, 26, 224 N.E.2d 502 (1967), the Department has recently explained that the rule against retroactive ratemaking has no application to a rate that has not yet become "fixed by a formal finding that had become final." Boston Gas Company, D.T.E. 96-50-D, pp. 8-11 (interim rates imposed pending Department consideration of remand decision) citing Blackstone Gas Company, D.P.U. 511 (1981) (revised cost of gas adjustment component causing re-computation of previous approved rates); Bell Atlantic Fifth Price Cap Compliance Filing, D.T.E. 99-102 (1999) (productivity factor adjustment to increase revenues); Bell Atlantic Fourth Price Cap Compliance Filing, D.T.E. 98-67 (1999) (disallowance of exogenous factor resulted in refund to ratepayers); Boston Gas Company, D.P.U. 18264-A (1975) (rates effective subject to refund); Blackstone Gas Company, D.P.U. 192 (1980) (company ordered to refund credits received from pipeline supplier).

Here, the rates in question cannot be characterized fairly as having become "fixed" and "final" so as to raise retroactive ratemaking concerns. Indeed, for many years the Department's action on the Company's rate filings took the following form:

The Department has given tentative approval to the Cost of Gas Adjustment Factor "GAF" of $.0852 per Therm filed on October 23, 1989, revised, to be applied to the firm gas sales during the billing months of November 1989 through April 1990. The Department will therefore allow the application of the GAF but reserves the right to change the factor or the method of computation or to require the Company to refund to its customers any amounts that are found by the Department to be the result of imprudent Company action in the event that subsequent review of the Company's filings or any other relevant information filed with the Department requires such changes, or if a new standard clause is promulgated by the Department.

Exh. FGE-3 (2/14/01), Attachment B (October 31, 1989 letter).

The Company's attempt to excuse its actions by relying on prohibition against retroactive ratemaking is especially problematic here since fuel adjustment clauses are "unique animals that are not easily assimilated to classical ratemaking principles." Maine Public Service Co. v. Federal Power Commission, 579 F.2d 659, 668 (1st Cir.1978). Consumers Organization for Fair Energy Equality, Inc. v. Department Public Utilities, 368 Mass. 599, 607, 335 N.E. 2d 341 (1975) ("fluctuations of charges to consumers under a cost adjustment clause are not, in the legislative pattern, changes in the schedule of rates invoking rate proceedings with any incident hearings."). In the ordinary course, the Department does not initiate the detailed adjudicatory process of ratemaking in connection with utility CGAC filings, and, consequently, the rule against retroactive ratemaking should not apply to the CGAC. Indiana Gas Company v. Office of the Utility Consumer Counselor, 575 N.E.2d 1044, 1052-53 (Ind.App.1991) (rule against retroactive ratemaking does not apply to fuel adjustment clauses); Equitable Gas Company v. Pennsylvania Public Utility Commission, 106 Pa.Cmwlth. 240, 526 A.2d 823, 830-31 (1987), appeal denied, 516 Pa. 644, 533 A.2d 714 (1987); Metropolitan Edison Co. v. Pennsylvania Public Utility Commission, 62 Pa.Cmwlth. 460, 437 A.2d 76, 79-80 (1981); Southern California Edison Co. v. Public Utilities Commission, 20 Cal.3d 813, 144 Cal.Rptr. 905, 576 P.2d 945, 954-55 (1978).

Given the retrospective and reconciling nature of fuel adjustment clauses in general, the Company cannot claim a lack of notice that the Department may later impose adjustments and require including refunds in connection with the CGAC. Fitchburg Gas & Electric Light Company, D.T.E. 98-51, p. 21, n. 8, citing Automobile Insurance Bureau of Massachusetts v. Commissioner of Insurance, 425 Mass. 262, 265, 680 N.E.2d 912 (1997) (six year look back period to correct past miscalculations does not violate rule against retroactive ratemaking); Niagara Mohawk Power v. P.S.C. of New York, 69 N.Y.2d 365, 514 N.Y.S.2d 694, 700, 507 N.E.2d 287, 293 (1987) ("[T]he power to order refunds must be implied for there is little purpose in reviewing fuel adjustment charges, and the consumer interests are ignored, if corrective action is not authorized for imprudent expenditures automatically passed

through to the ratepayers."); Daily Advertiser v. Trans-LA, 612 So.2d 7, 23 (La.1993); MGTC, Inc. v. Public Service Commission of Wyoming, 735 P.2d 103, 107 (Wyo.1987); Gulf Power Company v. Florida Public Service, 487 So.2d 1036 (Fla.1986); Public Service Commission v. Delmarva Power & Light Company., 42 Md.App. 492, 400 A.2d 1147, 1153 (1979).

REQUIRING A REFUND OF THE COMPANY'S WRONGFUL COLLECTIONS DOES NOT CONFLICT WITH THE FACT THAT THE COMPANY'S BASE RATES DURING THE PERIOD IN QUESTION WERE THE RESULT OF A RATE SETTLEMENT

The fact the Company's base rates during the period in question were the result of a rate settlement is simply not relevant to the issue presented in this case: whether the Company should be required to refund to consumers amounts collected beyond those permitted under the Department's regulations. It is irrelevant whether the Company's base rates at the time of these wrongful collections were the result of a settlement or a fully litigated decision. In either event, had the Company complied with the Department's regulations and sought approval for the vehicle under which it incurred the financing costs, there is absolutely no reason to believe that the Department would not have followed its past practice and deferred approval of the inclusion of the finance costs in the CGAC until it was clear that these costs were not also reflected in the Company's base rates. E.g. Boston Gas Company, D.P.U. 88-67, p. 30 (1988) ("To prevent the possible double collection of inventory charges, the gas inventory that is being financed by Boston LNG is not permitted to be included in the Company's rate base"). There is no basis in the record to suggest that the Department would have had reason in 1987 to have concluded that Fitchburg's base rates did provide for inventory finance costs. Indeed, the record suggests the opposite conclusion.(6) In the absence of such a basis, the fact that the Company's base rates had been determined by settlement as opposed to a Department adjudication is irrelevant. In either event, the Department could have presumed that the Company's base rate did not include recognition of gas inventory finance costs.

Moreover, even if the Department were somehow required to look beyond the fact of the stipulated revenue requirement in D.P.U. 84-145, its own past practice in an analogous situation demonstrates there the Company's plaints of difficulty, unfairness and inappropriateness are without merit. The Department could avoid these issues by looking beyond the stipulation to the Company last adjudicated rate case. In the past, in the context of a mandated rate reduction to ensure that consumers enjoyed the benefits of the 1986 corporate income tax rate reduction, the Department has avoided looking behind stipulations, by instead looking to the last rate case decided on the merits. See Reduction in Federal Income Tax Rates, D.P.U. 87-21-A, p. 21 (1987). ("[E]ach company shall compute the dollar amount of the revenue reduction based on its last rate case in which a federal income tax calculation was determined . . . .").

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Attorney General respectfully urges the Department to order the Company to make refunds to its customers of the $675,052 with interest computed from the time of the wrongful charges.

Respectfully submitted,

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1. For simplicity of expression, the Attorney General's simultaneous collection of two rates providing for the same cost item -- interest on gas inventories -- as "double-collection." In light of the redundant rate recognition of the same cost item, this usage is appropriate notwithstanding the observations of various witnesses about the assignability of particular base rate revenues.

2. While the Company does not agree that the amounts in question should be considered to be overcharges, there is no dispute regarding the amount of the charges in question. Compare Exh. AG-1, p. 3 with Exh. FGE-3, p. 8.

3. Lowell Gas Co., D.P.U. 19037 (1977), Cape Cod Gas Co., D.P.U. 19036 (1977), the companies that later became Colonial Gas Company. See also Standard Cost of Gas Adjustment Clause, D.P.U. 4240-78/ D.P.U. 19806 (1979), p. 2, fn. 1.

4. See Lowell v. Attorney General, 377 Mass. 37, 40 and the Court's discussion of Instruction No. 10 to the Uniform System of Accounts for Gas Companies, D.P.U. 4220-A. Dr. Tierney was unaware of this

decision. Tr. II, p. 224.

5. See e.g., April 17, 1985 transcript, pp. 55-59 and 61-73.

6. These facts include, but are not limited to, the following: 1) gas inventory finance charges are routinely allowed as a base rate cost, 2) until the 1987 CGAC filing, the Company never sought to recover gas inventory financing costs in any charge other than base rates, 3) the Company requested that approval of the inclusion of gas inventory cash working capital allowance in the cost of service used to determine base rates in D.P.U. 1214, 4) the cost of service submitted in support of the proposed base rate increase in D.P.U. 84-145 included a gas inventory cash working capital allowance as a rate base item; and, 5) the cost of service submitted by the Company in support of its proposed base rate increase in D.T.E. 98-51 included a gas inventory cash working capital allowance as a rate base item. Exh. AG-1, p. 17.